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COURT OF APPEALS
STATE OF NEW YORK

JACK E. ANDERSON,

Appellant,

-against-

NO. 78

CANDY ANDERSON,

Respondent.

20 Eagle Street
Albany, New York
November 18, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Amanda M. Oliver
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Appeal number 78, Anderson
2 v. Anderson.

3 Counsel?

4 MR. HAJDU: May it please the court, Lyle Hajdu
5 for Jack Anderson.

6 All nuptial agreements are governed by DRL
7 236(B) (3), and that's a statute that this Court of Appeals
8 characterized as unambiguous in a prior case called
9 Matisoff.

10 In this case, three judges examined the agreement
11 in dispute. They looked at the applicable statute, and
12 they determined that it was valid because it complied with
13 the statutory terms. In reaching that decision, the judges
14 applied the plain meaning to the statute, as this court did
15 in the Matisoff case.

16 JUDGE RIVERA: So Counsel, if I can interrupt
17 you. I'm on the screen. Hi.

18 So in Matisoff, we left open the question of
19 whether or not the acknowledgement had to be
20 contemporaneous with the signature. Why don't you address
21 why the majority of the Appellate Division is wrong to take
22 that position.

23 MR. HAJDU: Yes, Your Honor. Well, first of all,
24 Your Honor, contemporaneous acknowledgment is - - - is not
25 required by the statute. So it - - - it's not one of the

1 terms that - - - that is specifically outlined.

2 Two is there's no real - - - no definition as to
3 what is meant by contemporaneous. The - - - the
4 certificate, itself, there's a part where it says, "The
5 party acknowledged that he or she signed". And that would
6 be past tense.

7 So it presumes that the individuals are signing
8 and then can later present that for - - -

9 JUDGE RIVERA: Yes, that - - - that's true. But
10 that only means it doesn't have to be simultaneous. That
11 doesn't mean it has to be contemporaneous. That strikes me
12 those are two different things. But let - - - let me try
13 this a different way.

14 How is one party to the agreement holding off on
15 the acknowledgment seven years until just before filing for
16 divorce really in line with the purposes and - - - and in
17 recognition of - - - of the purpose of the acknowledgement
18 requirement, the other formalities, and in recognition of
19 what, again, the court has said over and over, is you know,
20 the - - - that moment that you realize the - - - the
21 consequences of signing that - - - that prenup agreement.

22 Strikes me your client is making that assessment
23 years later in a different context from the other party.
24 But I - - - I think we have said in the past that the point
25 is that these parties are assessing this at the time that

1 they are deciding whether or not to enter the agreement,
2 and that that's when they sign; that's when they - - -
3 those formalities ensure that they - - - that the
4 weightiness of these choices fall heavy on them and that
5 they've thought them through.

6 MR. HAJDU: Your Honor, we know that in general
7 practice, these agreements are signed in - - - in
8 counterparts.

9 JUDGE RIVERA: Um-hum.

10 MR. HAJDU: So whether that's - - - in my own
11 practice, I can say that they are either days apart, weeks
12 apart, sometimes months, and I've even had them years
13 apart. But - - -

14 JUDGE RIVERA: Um-hum.

15 MR. HAJDU: - - - it doesn't create a problem
16 because the - - - it's - - - it's a question of how the
17 parties executed it. And there's no challenge during that
18 - - - during that pendency.

19 In this case, the wife accepted the benefits of
20 the agreement during the course of the marriage. She never
21 raised any issues. There's no claims of fraud or duress
22 here. And she never sought to revoke or - - - or rescind.

23 JUDGE WILSON: So let me - - - let me ask you
24 this. Over here, sorry.

25 If Mr. Anderson had never signed the agreement,

1 would it have been enforceable against him?

2 MR. HAJDU: Not - - - not under the - - - not
3 under the code, no.

4 JUDGE WILSON: So then if we don't have some sort
5 of contemporaneous requirement, that doesn't mean
6 instantaneous, it might be in a month or two, but
7 something, you're essentially converting an agreement that
8 the parties thought was going to bind them both into a one-
9 way option for the nonsigner.

10 MR. HAJDU: And that was the rationale, Your
11 Honor, that was raised by the Fourth Department.

12 JUDGE WILSON: And so what's wrong with that?

13 MR. HAJDU: I - - - I think there's two problems
14 with it. Number one is in this particular case, if the
15 husband enforces the agreement, the wife gets exactly what
16 she expected.

17 If the husband opts not to enforce the agreement,
18 then presumably, that favors the wife and she gets
19 something more, which would be a - - - a windfall.

20 JUDGE RIVERA: Well, I don't - - - I don't
21 understand that because - - - not necessarily. I mean,
22 what if, all of the sudden, he became bankrupt.

23 MR. HAJDU: And - - - and you lead me into the
24 second problem, Your Honor; that's exactly what it is, is
25 it creates a subjective standard. So now the judge becomes

1 outcome oriented, so instead of just objectively calling
2 balls and strikes, the judge has to consider how that call
3 is going to affect a particular party.

4 So if - - -

5 JUDGE RIVERA: But it - - - it's not purely
6 subjective. Of course, there have to be some boundaries.
7 I get your point. I'm not going to disagree with you on
8 that. But of course, it could have been resolved if your
9 client had had it acknowledged within a reasonable period
10 of time.

11 MR. HAJDU: Well - - -

12 JUDGE RIVERA: Again, it doesn't - - - I - - - I
13 - - - I do think there is a difference between
14 contemporaneous and simultaneous. And - - - and the court
15 below didn't say it had to be simultaneous or that they
16 both had to do it at - - - in - - - before the same
17 individual. So yes, of course, you - - - there - - - the
18 circumstances might - - - might require that this is not
19 done simultaneously.

20 MR. HAJDU: The - - - the problem, Judge, is
21 we're now going into an area of, as I indicated from my - -
22 - my own practice, and I'm just in general practice, but I
23 - - - I've got these agreements, as I said, days, weeks,
24 months, and years apart where the parties signed them.
25 There is no - - -

1 JUDGE GARCIA: But is that a good thing, counsel?
2 Here, sorry. I'm - - - you know, that may happen, but is
3 that a policy we want to encourage? I mean, it may be in
4 your practice, people sign these years apart. But why
5 would we want that?

6 MR. HAJDU: Well, my - - - my concern, though, is
7 a retro - - - a rule that retroactively invalidates all
8 these agreements that we think are valid.

9 JUDGE WILSON: I thought you had earlier said
10 that in your experience, they were almost always signed
11 simultaneously?

12 MR. HAJDU: No. I must have misspoke.

13 JUDGE WILSON: Okay, I must have misheard you.

14 MR. HAJDU: There - - - there - - - the vast
15 majority are done in counterparts. The - - - the - - - the
16 vast majority. I - - -

17 JUDGE WILSON: In - - - in counterparts
18 contemporaneously?

19 MR. HAJDU: In counterparts, meaning that the - -
20 -

21 JUDGE WILSON: No, no, I understand. Yeah, but
22 within the week of each other?

23 MR. HAJDU: Your Honor, it - - - it's sometimes
24 the same day. It's sometimes within weeks. It's sometimes
25 within months.

1 JUDGE WILSON: No, I got - - - I got that part.
2 I was trying to ask about frequency.

3 MR. HAJDU: Oh, I think - - - I think that with -
4 - - within - - - if the general rule is that they sign in
5 counterparts, the majority of them are closer to the days
6 and weeks as opposed to months and years. But we have - -
7 -

8 JUDGE GARCIA: But - - -

9 MR. HAJDU: - - - we have agreements that are out
10 there and there's - - - there's never been a statutory
11 prohibition is the problem. And if - - - if - - - if
12 there's - - - if we say that DRL 236(B) is broken, and we
13 want to fix it - - -

14 JUDGE GARCIA: But what if we say you - - - you
15 need to do this within a reasonable amount of time; would
16 we really be changing the law because of all these people
17 had signed it within an unreasonable amount of time?

18 MR. HAJDU: Well, is that a - - - is that a five-
19 day rule, is that a five-week rule - - -

20 JUDGE GARCIA: But that's a - - -

21 MR. HAJDU: - - - a five - - -

22 JUDGE GARCIA: - - - that's an issue the courts
23 deal with all the time: what's a reasonable amount of
24 time.

25 MR. HAJDU: Well, the - - - the - - - again, Your

1 Honor, the - - - the problem is that it leads to
2 potentially different calls by different courts if we're
3 going to use a reasonableness standard. And then it
4 creates an uncertainty in the law. We - - - it - - - it
5 undermines the general policy, which is favoring these
6 folks coming together and making their own - - - their own
7 agreement - - -

8 JUDGE RIVERA: Yes, but that - - - that was my
9 point before, that the purpose is indeed for them to come
10 together and appreciate the consequences of the provisions
11 of the antenuptial agreement, to decide it for themselves,
12 and sign this, and - - - and comply with all the
13 formalities. This strikes me that they're not coming to an
14 agreement if, with your example, years later - - - or this
15 case, seven years later, the husband decides, you know, I'm
16 going to get to that courthouse first and - - - and get
17 divorced, and let me get this thing acknowledged now that
18 my lawyer has told me I got to do that to make sure this is
19 effective.

20 But that - - - do we want to have that kind of
21 unilateral conduct that is not based on what the parties
22 knew within the same amount of - - - scope of time?

23 MR. HAJDU: I - - - I - - -

24 JUDGE RIVERA: I mean, what's wrong with just
25 saying it has to be reaffirmed?

1 MR. HAJDU: I - - - I understand. I see the - -
2 - that my time is up.

3 CHIEF JUDGE DIFIORE: If you would like to finish
4 your thought, Counsel, go ahead.

5 MR. HAJDU: Judge, I just - - - I - - - I get it.
6 I go back to the dilemma that the court talked about,
7 though, in - - - in Matisoff, which is, are you guided by
8 the plain meaning of the actual terms of the statute or are
9 you now under certain exceptions and - - - and requirements
10 in order to achieve some other goals? And the court
11 previously found the statute was not ambiguous. The
12 statute, I would argue, hasn't changed. And I would simply
13 ask the court to find in this case, for the very same
14 reasons, that it's - - - it's not ambiguous.

15 It's not required to be simultaneous or
16 contemporaneous. It can be done in counterparts, and that
17 takes over a period of time. And if we want to come up
18 with a new rule, rather than invalidating all these
19 existing agreements, we - - - something that is
20 prospective, you know, that then that is - - - is, at least
21 in the future, that the attorneys know how to advise or
22 counsel.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 Counsel?

25 MS. KILBRIDGE: Thank you very much.

1 Your Honors are obviously very well familiar with
2 the facts of this case. The one undisputed fact of this
3 matter is that on September 11th, 2011, the date that
4 respondent signed and had acknowledged the agreement, there
5 was a time period from then until May 31st, 2018, where
6 there was no enforceable agreement.

7 JUDGE RIVERA: Counsel, if I can interrupt you.
8 Counsel, I'm on the screen.

9 MS. KILBRIDGE: Oh, yep, sorry.

10 JUDGE RIVERA: Hi. No, that's fine.

11 MS. KILBRIDGE: Hello.

12 JUDGE RIVERA: So why - - - why isn't your
13 adversary correct, you know, that Candy's not in a worse
14 position? She agreed to this seven years ago, it's exactly
15 what - - - what she had agreed to.

16 MS. KILBRIDGE: I have an answer for that.

17 JUDGE RIVERA: Where - - - where's the foul in
18 it?

19 MS. KILBRIDGE: Respondent went through the
20 entire marriage in the knowledge that there was not a valid
21 agreement. And she could very well have made decisions
22 during that time that she would not have made if there had
23 been a valid agreement. She repeatedly - - - as her
24 affidavit says, she repeatedly told her husband that there
25 was no agreement, he'd never given her a signed agreement,

1 that there was no agreement. And he threw in her face
2 there's an - - - a prenup. But there wasn't one, and she
3 knew it, because she hadn't gotten it. And she could very
4 well have made decisions, as I say, in the - - - for
5 example, she could have made a decision not to save money
6 on her own during the - - - the marriage when money was
7 available to her, that - - - because she knew that there
8 was no agreement, and so she'd have access to all of the
9 funds of the joint marriage.

10 So - - -

11 JUDGE WILSON: There's a - - -

12 MS. KILBRIDGE: - - - there are all kind of - - -

13 JUDGE WILSON: There's a fundamental issue, I
14 think, that is under - - - it may be a mistake, that is
15 underlying, I think, both of - - - of your views on this.
16 Which is that I think you're both assuming that Mrs.
17 Anderson couldn't have made, on her own, a great deal of
18 money, much more than her husband, or that somebody in her
19 position - - - because we're not talking about these
20 parties in particular - - - during the marriage. And that
21 if, as your adversary said, the agreement would not have
22 been enforceable against him if he didn't sign it, in that
23 circumstance, she's not getting anything like the benefit
24 of her bargain, right? She couldn't - - - she could have
25 made a tremendous amount of money, and he could say, oh,

1 you know what, the prenup is not enforceable because I'm
2 not signing it today.

3 MS. KILBRIDGE: That's exactly right.

4 JUDGE WILSON: And that's - - - and that's a
5 problem.

6 MS. KILBRIDGE: Yeah, that - - - that is a
7 problem. That's - - - that's a problem for her because if
8 she knows that it's not - - - if - - - if - - - if she's
9 operating throughout the marriage as if it's not - - - not
10 in effect and - - -

11 JUDGE WILSON: Even - - - even if she's - - -

12 MS. KILBRIDGE: - - - and it's totally up to him
13 - - -

14 JUDGE WILSON: My point is even if she's not
15 operating that way, even if she just hits the lottery on
16 her own nickel.

17 MS. KILBRIDGE: If it's totally up - - -

18 JUDGE WILSON: If her - - - it's not a question
19 of her reliance, I think, is it?

20 MS. KILBRIDGE: Well, I think, to some extent,
21 that it is. And I think that that's what the Fourth
22 Department indicated in their decision.

23 But I - - - I think that if she had been - - -

24 JUDGE FAHEY: Well, let me - - -

25 MS. KILBRIDGE: - - - if he could decide whether

1 to - - -

2 JUDGE FAHEY: Let me - - - excuse me. Let me ask
3 this.

4 MS. KILBRIDGE: Sure.

5 JUDGE FAHEY: Isn't your argument that - - -
6 aren't you asking us to say, judges, number one, was there
7 a contract in the absence of - - - of the signature and
8 acknowledgement, right?

9 MS. KILBRIDGE: Right. Yes.

10 JUDGE FAHEY: That's the first thing. And if
11 there wasn't - - - a contract, then what's the standard
12 that we apply to determine if there may have been a
13 contract, and that would be a reasonableness standard or
14 reasonable person standard. As we would with any contract,
15 right?

16 MS. KILBRIDGE: Right.

17 JUDGE FAHEY: So he signs it late, so he waits
18 seven years to sign it, or whatever the time period was,
19 how long is too long, and is that reasonable? That's the
20 second - - -

21 MS. KILBRIDGE: Well - - -

22 JUDGE FAHEY: Let me just finish.

23 MS. KILBRIDGE: I'm sorry.

24 JUDGE FAHEY: That's the second part of it; is
25 that correct?

1 MS. KILBRIDGE: Well, I think that it's correct
2 to a certain extent. Obviously, if there are - - - if a -
3 - - if a year goes by or a significant period of - - -

4 JUDGE FAHEY: Well, I - - - it'd - - - let me ask
5 - - - let me ask you this.

6 If the reasonable standard is what you're asking
7 us to apply, what you're really asking us to do is say - -
8 - you want this to be a jury question. You want this to go
9 to a trier of fact to determine whether or not there was a
10 contract here when he signed it seven years afterwards.
11 Did that change the nature of the contract or was there a
12 contract to begin with?

13 MS. KILBRIDGE: What - - - what I'm saying is
14 that there's - - - that after a short period of time, the -
15 - - her signature and acknowledgement have to be
16 reaffirmed. If he's going to wait a year, two years, any
17 significant period of time, then he's got to get hers - - -
18 her signature reaffirmed so that they're entering into the
19 contract at the same time.

20 JUDGE FAHEY: Thank you.

21 MS. KILBRIDGE: Thank you.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel. Thank
23 you very much.

24 Counsel, I took the liberty of reserving one
25 minute for rebuttal time for you if you care to exercise.

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MR. HAJDU: Thank - - - thank you, Your Honor.

Counsel's aware of the concerns raised by the court, but again, these are, like, public policy concerns and rationales for why the existing rule should be, perhaps, amended.

But the reality is that in private practice, these agreements are executed in counterparts on a regular basis. And now, without having a definitive rule, if - - - if we're going to have a rule that comes out that retroactively invalidates them, I think that creates an uncertainty in the law and a chaos because, as I leave the courtroom today, I don't know what to advise clients in terms of how long between signatures, or how long between a signature and an acknowledgement, is - - - is valid or invalid.

So that is all the more reason why such a issue should be resolved through the legislative process, so that it gives notice to all the parties and all the litigants in New York State.

CHIEF JUDGE DIFIORE: Thank you, sir.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Anderson v. Anderson, No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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